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In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, is wife,

Petitioners,

v.

WISCONSIN DEPARTMENT OF
REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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The purpose of this reply is to refute the arguments of the respondent in its brief in opposition to the petition for a writ of certiorari to the Supreme Court of Wisconsin.

REPLY ISSUES INVOLVED

1. Was a federal question properly presented to the Wisconsin Supreme Court? We submit that it was.

2. Does this Court have jurisdiction to review the judgment of the Wisconsin Supreme Court? We submit that it does.

References to "App. ....." are to the separate Appendix to petitioner's petition.

References to "WBr. ....." are to petitioners brief and appendix as respondents in the Wisconsin Supreme Court.

References to "WRBr. ....." are to petitioner's brief on motion for rehearing in the Wisconsin Supreme Court.

STATEMENT OF FACTS

The respondent states at page 4 of its brief, that,

> "The petitioners did not file partnership Income Tax Returns which, contrary to statements in the petition, were required by Wisconsin law, sec. 71.10 (3) (a), Wis. Stats."

The Wisconsin Supreme Court determined that petitioners were not a partnership under Wisconsin law, therefore, they could not be required to file partnership income tax returns required by the above mentioned Wisconsin law. That is a part of the federal constitutional question now before this Court on the basis that other husband and wife taxpayers are not required to file partnership income tax returns in order to report their separate income, which should be extended to the petitioners under the Wisconsin Women's Equal Rights Act and the decision of this Court in *Hoeper v. Tax Commission*, 248 U. S. 206, 52 Sup. Ct. 120 (1931).

The statement of the respondent that the petitioners did not properly present to the Wisconsin Supreme Court the constitutional questions raised by them in their petition to this Court, is not supported by the record in the Wisconsin Supreme Court. The petitioners in this Court were the respondents in the Court below. In their first brief to the Court below, constitutional references and arguments in support thereof appear as follows:

In the Index at page v, reference is made to "CONSTITUTIONAL AMENDMENTS INVOLVED, Federal Constitution, Fourteenth Amendment."

Also, excerpts of the brief are as follows:

In 48 Am. Jur. 2d, (Labor and Labor Relations) at sec. 2, is stated:

"The right to labor and to its protection from unlawful interference is a Constitutional as well as a common law right. Every man has a right to the fruits of his own industry. *Labor is deemed to be property,* especially within the meaning of the Constitutional guarantees. Thus the right to acquire property includes the right to acquire property by labor. The right to earn wages is just as much property and within the meaning of the due process clause of the Fourteenth Amendment to the Federal Constitution." (Emphasis ours) (W Br. 31, 32)

"To deny the wife the right to claim one-half of the farm income is a direct violation of the Fourteenth Amendment of the Federal Constitution; the First Amendment of the Wisconsin Constitution; the spirit of Wisconsin Fair Employment Practice Act, (sec. 111.31 (1) and the proposed Women's Rights Amendment to the Federal Constitution." (W Br. 32) . . .

"Income tax, inheritance tax and federal estate taxes are dependent upon each other and must be considered together in determining ownership and contribution of money or monies worth. The Commission denied to the taxpayers the right to split their income for tax purposes. This was prejudicial to the husband by increasing his tax, and prejudicial to the wife by denying her the right to claim half of the property that she earned as exempt from federal tax and state inheritance tax in the event of the death of her husband." (W Br. 30) . . .

"This imposition of additional federal estate tax by the department (by interpretation) upon the taxpay-

ers of Wisconsin must be clarified by the Court in the absence of legislation. Lawyers and tax planners should be provided with clear rules regarding ownership and taxation of property in order that they can advise their clients with any degree of certainty and reliability." (W Br. 31) . . .

"The inequity of Wisconsin denying the wife the right to claim one-half of their property as exempted from federal estate tax under the rule of *Otte* is discussed at part XI above." (W Br. 36) . . .

"The decision of the Commission denied the wife a substantial property right by not allowing her to claim for tax purposes the one-half of the farm income in accordance with the agreement with her husband and to which she contributed as much work, property, energy and management as her husband." (W Br. 39) . . .

"The decision of the Commission should be reversed for having prejudiced substantial rights of the taxpayers as a result of its findings, inferences and conclusions being contrary to their constitutional rights and unsupported by substantial evidence in view of the entire record as submitted, in accordance with the provisions of Section 227.20 (1), Wis. Stats." (W Br. 40)

ARGUMENT

The issues raised in this case are not solely the issues of state law. The same United States Constitutional issues exist in this case as existed in *Hoeper v. Tax Commission*, supra, whereby this Court reversed 202 Wis. 493, 233 N. W. 100 (1930) and held that the statute combining separate earnings of the wife with that of the husband for tax purposes, violated the Due Process Clauses of the Fourteenth Amendment, United States Constitution. This Court based that decision on the Wisconsin Women's Equal Rights Act,[1] which designates a married woman's earnings, even though from a joint enterprise with her husband, as her separate and distinct property and earnings. This federal constitutional argument was presented to the Court on motion for rehearing and petitioners oral argument included the argument relative to the Wisconsin Women's Equal Rights Act. The oral argument did not specifically refer to *Hoeper*, but *Hoeper* was briefed and argued on motion for rehearing.

At the bottom of page 8 and top of page 9 of Respondent's Brief in Opposition to Petition, is stated:

> "The petitioners did subsequently make a motion for rehearing to the Wisconsin Supreme Court and they did then attempt to raise some federal constitutional issues. The rule in Wisconsin, and elsewhere, however, is that the supreme court will not consider questions raised for the first time on a motion for rehearing. *It, therefore, denied the motion for rehearing without opinion.*" (Emphasis ours)

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[1]Sections 246.01, 246.03 and 246.15, Wis. Stats.

Nothing in the record nor the files of the Clerk of the Wisconsin Supreme Court indicate that that was the reason it denied the motion for rehearing, which they did deny, without costs. This is an unsupported assumption on the part of the respondent.

The Wisconsin Supreme Court usually renders an opinion in denying a motion for rehearing when the brief in support of same brings up entirely new facts, new subject matter or new argument that was not presented to the Court by brief or oral argument in any manner, as they did in *Martinson, Lawn* and *Hanson,* cited at page 8 of Respondent's Brief. In our case, the Court realized that some federal constitutional issues were presented to it by brief and oral argument and therefore, denied the motion without opinion on the merits of the argument. In *Martinson, Lawn* and *Hanson,* the fact, subject matter or argument presented to the Court on motion for rehearing was not mentioned or presented to the Court in any manner prior thereto, which is not this case. The constitutional issues were not discussed by petitioners as thoroughly by brief and oral argument as they were in the brief on motion for rehearing. A better statement of the law applicable here, is found in *Am. Jur.* 2d (Appeal and Error), Ch. 988, page 414, which states:

> "Rehearings are not granted as a matter of right,[10] and are not allowed merely for the purpose of reargument,[11] unless there is a reasonable probability that the court may have arrived at an erroneous conclusion[12] or overlooked some important question or matter necessary to a correct decision.[13] *The rehearing may be granted if the decision was based on a wrong principle of law*[14] *as where the decision is in conflict with*

an express statute,[15] *or with a controlling decision to which the court's attention was not called."*[16] (Emphasis ours)

The Wisconsin Supreme Court was aware of petitioner's oral argument in support of federal constitutional issues presented and those presented it by brief prior to the motion for rehearing. In the oral argument specific mention was made to the Wisconsin Married Women's Equal Rights Act and the unequal protection of the law which made a Wisconsin widow pay $9,350.00 Federal Estate Tax while the same woman with the same estate and under the same circumstances in Indiana would pay no tax. The brief on motion for rehearing expanded the oral argument of the petitioners before the Court relative to the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, U. S. Constitiution. It further argued that the Court in its decision had arrived at an erroneous conclusion, overlooked an important question, and that the decision was in conflict with an express Wisconsin statute. It also overlooked the controlling decision of *Hoeper*, supra, to which its attention was not previously called. The motion for rehearing also, asked the Court to make a decision upon the federal constitutional questions that were presented to it by brief and oral argument.

Wisconsin law allows husbands and wives to split their joint income from rents, interest, dividends and capital gains on the Wisconsin Combined Income Tax Returns without filing a partnership return, because it was forced to recognize that one-half thereof is the separate earnings of each spouse in accordance with the Joint Tenancy Laws

of Wisconsin,[2] the Women's Equal Rights Act of Wisconsin, supra, and the decision of this Court in *Hoeper,* supra. What the Wisconsin Department of Revenue refused to accept as law was the fact that the right to split their separate income, without filing a partnership tax return, applied also to business income from joint property that was contributed to substantially by capital investment with the remainder of the contribution being the equal management and labor of the husband and wife. If the Wisconsin Supreme Court allows the ownership of capital the right to split income therefrom, the Fourteenth Amendment, United States Constitution, guarantees the separate property right of both the husband and the wife in their labors. This Constitution question was presented to the Court below for its consideration in petitioners very first brief to the Court.

The present petitioners also presented the basis of the federal Constitutional argument to the Court below in their oral argument before the Court. This argument was orally made to the Court in the context of the application of the Wisconsin Women's Equal Rights Act, which are Sections 246.01, 246.03 and 246.15, Wis. Stats., and were referred to the Court on the same basis that this Court ruled in *Hoeper,* supra. As a follow-up to the petitioner's oral argument before the Court below, they presented same in writing in their brief on motion for rehearing at WR Br. 9-11, under the heading of *"Decision Unconstitutional Under Fourteenth Amendment."* Reference was made therein to the Due Process and Equal Protection clauses of the federal Constitution, and was an expansion

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[2]Section 700.17 (2), Wis. Stats.

of the oral argument previously had before the Court below. Motions for rehearing are authorized by Section 257.65, Wis. Stats. The statutes do not prevent the expansion of a part of the oral argument previously presented to the Court. I know of no Wisconsin case or statute that prevents the presentation of Constitutional issues to the Court on motion for rehearing, that were presented to the Court below in either the brief filed with the Court or the oral argument before the Court. The Wisconsin Supreme Court frowns upon any oral argument that is a repetition of the argument in the briefs previously filed with the Court. The respondents are of the opinion that the federal Constitutional issues were properly presented to the Court below and they were not presented for the first time in the motion for rehearing.

Respondents also contend on page 7 of its response, that the federal questions were not decided by the Wisconsin Supreme Court. We contend that the Court admitted the proper presentation of the federal Constitutional issues to it and decided upon them when it made mention of the "multiple issues" presented to it by the present petitioners at App. 9. Why the Court below did not formally allude to the federal Constitutional questions presented it in its opinion, is unknown to us. It must be admitted that it read them in the brief and heard them in the oral argument and that it read the brief on motion for rehearing. The fact is that the Court below still (Despite *Hoeper* and the above statutes) clings to the old archaic common law rule that, "When man and woman get married, they become one, and the husband is that 'one", and that no matter how much work and management a wife contributes to a joint business with her hus-

band, she is "only assisting him" and all the joint property and earnings therefrom "are his property for all tax purposes".

We submit that the decision of this Court in *Hoeper*, supra, has included the petitioners property rights under the Due Process and Equal Protection clauses of the United States Constitution and that the question was properly submitted to and decided by the Court below. A federal question has been presented to this Court by the petitioners.

A review of all the federal cases cited by respondent in its brief in support of its legal contention that the federal question was raised for the first time are cases in which any mention of federal constitutional questions, or the subject matter in support thereof, was admittedly not presented *in any way* to the Court below. (Emphasis ours) In *Cardinale v. Louisiana* (1969), 394 U. S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398, the Court said in this regard:

> "In view of the petitioner's admitted failure to raise the issue he presents here *in any way below*, the failure of the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioners, the writ is dismissed for want of jurisdiction." (Emphasis ours)

The law is clear that any argument, fact or legal discussion is proper to be presented to the Court for the first time in oral argument before that Court. This principle

of legal procedure is confirmed in *Cardinale* where it wrote (394 U. S. 437, 438):

> "Although certiorari was granted to consider this question (admissibility of a confession), *the fact emerged in oral argument that the sole federal question argued here had never been raised,* preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." (Emphasis ours)

CONCLUSION

It is not only the petitioners, but thousands of other husbands and wives in Wisconsin, that are asking this Court, as our Court of last resort, under exceptional circumstances necessitated by justice and equity, to issue a Writ of Certiorari to the Supreme Court of Wisconsin, or remand same back to the Court below with the directive to reconsider the federal Constitutional questions presented it and make a written decision thereon.

Respectfully submitted,

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